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OCTOBER TERM, 1953

[redacted]

R. ASAKURA,

Plaintiff in Error,

vs.

THE CITY OF SEATTLE, HARRY W. CARROLL, as Comptroller, and WILLIAM H. HOAGLAND, as Chief of Police, of The City of Seattle,

Defendants in Error.

[redacted]

[redacted]

[redacted]

[redacted]

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Appellant's Brief

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INDEX

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STATEMENT OF THE CASE

This is a writ of error to the Supreme Court of the State of Washington to review a judgment of that court which reversed a decree of the Superior Court of King County, Washington, perpetually restraining the defendants from enforcing Ordinance

No. 42323, requiring all persons engaging in business as pawnbrokers to secure a license from the city so to do, and as a condition precedent, and providing that no license should be granted to anyone not a citizen of the United States, the plaintiff in error contending that the ordinance is unconstitutional and in violation of the Treaty between the United States of America and the Empire of Japan, and of the due process and equal protection clauses of the Fourteenth Amendment. (Rec. pp. 1-6.)

THE BILL OF COMPLAINT

The defendants in error are a municipal corporation, its Comptroller and Chief of Police, respectively. The plaintiff in error is a subject of the Emperor of Japan, has been a resident of the City of Seattle continuously since 1904, having duly entered the United States and having complied with all acts of Congress and regulations relating to the entry of aliens into the confines of the United States. Since the month of July, 1915, the plaintiff in error has been continuously engaged in business as a pawnbroker in the City of Seattle, during all of which time he has complied with all laws and ordinances relating to or respecting his business, and

has conducted his business honestly and in good faith. His place of business is in all respects a fit and suitable place for conducting such business and at all times has been. He speaks, reads and writes the English language. The ordinance in question was approved on the 2nd day of June, 1921. It was passed for the sole purpose of preventing any alien from securing a license to engage in business as a pawnbroker in the City, and as a part and parcel of a plan on which the City had for more than a year prior to the commencement of the action been engaged of preventing subjects of the Emperor of Japan, lawfully residing in the United States and engaging in business in the City of Seattle, from being able to carry on or engage in business for which a license so to do was required by the City. The plaintiff in error did not apply to the City for a license to engage in business as a pawnbroker as required by the terms of the ordinance in question, because it would have been utterly useless for him so to do, and because the City would not receive from him an application for a license, which refusal was because of the ordinance in question; and the City would not grant the plaintiff a license to engage in business as a pawnbroker for the sole and only reason

that he was a subject of the Emperor of Japan and not a citizen of the United States. On the 24th day of October, 1906, there was duly approved Ordinance No. 14,404, of the City of Seattle, repealed by the ordinance in question, and which did not discriminate against aliens. On the 9th day of August, 1920, the plaintiff in error duly made an application for a license to engage in business as a pawnbroker under and by virtue of the ordinance last mentioned, and for a renewal of his then license which had theretofore been granted to him by the City under such ordinance, such application being in due form and as required by the City and did all things required to be done by him for the making of such application, which application was duly referred to the License Committee of the City Council of the City of Seattle, which Committee reported thereon recommending that the license be granted, but on the 23rd day of August, 1920, the City Council refused to grant the license for the sole and only reason that plaintiff in error was a subject of the Emperor of Japan and despite the fact that he then was and at all times had been a fit and suitable person to have such license and to engage in such business, and despite the fact that his place of business then was and at

all times heretofore had been a fit and suitable place in which to carry on such business. That in order to carry on the business of a pawnbroker successfully it is necessary that the same be done continuously and without interruption in order to maintain the good will of the business and the business itself. That the defendent Comptroller has threatened to arrest the plaintiff in error because he is engaged in the business of pawnbroker without a license and will do so from day to day unless restrained by the court, and the defendant City will not permit him to have a license on the sole ground that he is a subject of the Emperor of Japan; that if arrests are made his business will be ruined and if the defendants are not enjoined from so doing they will arrest him from day to day and he will thereby suffer an irreparable damage. Plaintiff in error further alleged that at all times he has been and now is willing to comply with any valid ordinance of the City respecting his business and at all times has been ready and willing to pay the defendant City the license fee required by it for that purpose. The plaintiff in error prayed for a temporary restraining order, a temporary injunction and a perpetual injunction against the enforcement of the ordinance. (Rec. pp. 1-6.)

TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

On the filing of the bill of complaint, a temporary restraining order was issued, as prayed for, and, upon the hearing of an order to show cause, a temporary injunction was granted accordingly. (Rec. pp. 6-10.)

THE ANSWER

The defendants in error by answer admitted the capacity of the parties as alleged, the passage and approval of the two ordinances alleged; that the plaintiff in error had been engaged in business as alleged; that he had not applied for a license and that the defendant Comptroller intended to make an arrest as alleged, but denied all other allegations in the complaint. (Rec. p. 33.)

The ordinance questioned is found on pages 26-32 of the Record. It is sufficient to call attention to the fact that, by its terms, a license must be secured from the City to engage in the business as pawnbroker and that the following provision appears in Section 6:

> "Provided, however, that no such license shall be issued unless the applicant be a citizen of the United States. * * *"

Ordinance No. 14,404 mentioned in the bill, was repealed by the ordinance in question. It contained no provision making citizenship a condition precedent to a license.

THE TRIAL

On the trial of the action the plaintiff testified that he came to Seattle in 1904 direct from Japan; that he is of Japanese parentage; that he arrived at Vancouver, B. C., and, in coming to Seattle, complied with all the requests of the Immigration Department; that he has lived in the United States continuously; that he is a pawnbroker and watch maker and has been so engaged since the year 1915, occupying but one location; he had never been arrested; the police officers examined his books as they do all other pawnbrokers; he makes all reports required by the ordinance relating to pawnbrokers and all required by the police department; he reads and speaks the English language; he began business with $1,000.00 invested capital and has now a $5,000.00 investment; if he were compelled to go out of business, even temporarily, his trade would go elsewhere; there has never been any complaint as to his location. (Rec. 13-16.)

The court refused to permit the plaintiff to show that, under a prior ordinance, the plaintiff has been denied a license wholly because he was a subject of the Emperor of Japan, and refused to permit the plaintiff to show that the ordinance in question was passed for the purpose of preventing Japanese from securing licenses to engage in business as pawnbrokers. (Rec. 16-20.)

The trial court entered a decree adjudging the Ordinance to be in violation of the due process and equal protection clauses of the Fourteenth Amendment and enjoined the defendants from enforcing the ordinance against the plaintiff in error until such time as the City should grant him a license. On appeal to the Supreme Court of the State, that court held, first, that the business of a pawnbroker was a privilege only and could be prohibited to all persons, and second, that the plaintiff in error was not protected by the due process and equal protection clauses of the Fourteenth Amendment or by the Treaty between the United States and Japan.

SPECIFICATIONS OF ERROR

The assignments of error appear on pages 41-42 of the Record. They allege that the court erred in holding the ordinance constitutional and not

in violation of the due process and equal protection clause of the Fourteenth Amendment and of the Treaty between the United States and the Empire of Japan.

PROPOSITIONS DISCUSSED

The propositions we desire to discuss are:

1. A business, occupation or calling cannot be prohibited by a state legislature unless there is *inherent* in the business, occupation or calling *itself*, irrespective of the character of some men who may engage in it, some evil or direct tendency to evil.

2. The business of pawnbroker is lawful and legitimate and cannot be prohibited by the legislature.

3. The City cannot decline to grant a license to the plaintiff in error merely because he is a subject of the Emperor of Japan.

4. The Treaty does not permit of the refusal of the City to grant the plaintiff in error the license in question.

A BUSINESS, OCCUPATION OR CALLING CANNOT BE PROHIBITED BY A STATE LEGISLATURE UNLESS THERE IS INHERENT IN THE BUSINESS OCCUPATION OR CALLING ITSELF, IRRESPECTIVE OF THE CHARACTER OF SOME MEN WHO MAY ENGAGE IN IT, SOME EVIL OR DIRECT TENDENCY TO EVIL.

An argument has been made to the effect that engaging in business as a pawnbroker is a privilege and not a right and that, therefore, the City may say to one man that he may and to another that he may not engage in the business and enforce its mandate by criminal prosecution. The argument of privilege is based on the contention that thieves frequently resort to pawnbrokers to sell stolen articles, and that by reason of such practice the City has a right to prohibit all men from engaging in business as pawnbrokers. It is believed that the argument seriously mistakes the limit of the right of prohibition and confounds that right with the right of mere regulation under the police power. It is believed that the opinion of the Supreme Court proceeds upon the theory that, under police power, the City has the right to regulate the business, and, having the power of regulation, it necessarily follows that it has the power of prohibition. No greater fallacy could be suggested. Every business, every profession and every calling is subject to the police power but the power to regulate is not always the power to prohibit. The state, under its police power, may regulate the business of a warehouseman and require the taking out of a license as a condition precedent to engag-

ing in that business, but cannot prohibit the business.

Cargill Company v. Minnesota, 180 U. S. 452, 468.

The state, under the police power, may require an employment agent to take out a license as a condition precedent to engaging in the employment business.

Brazee v. Michigan, 241 U. S. 340.

But the state cannot proscribe and prohibit the employment business.

Adams v. Tanner, 244 U. S. 590.

The rule is that businesses or occupations may be prohibited when, and only when, there is inherently in the businesses, occupations or callings, themselves, without regard to the men or character of men who at times engage in them, a menace to the public welfare, or a tendency to that which is harmful. This rule is well illustrated by the cases from this court as shown by the following subjects:

Lotteries were prohibited constitutionally by the states, not only because they were a form of gambling, but because the inevitable tendency was to impoverish the public.

Phelan v. Virginia, 8 Howard 163.

In that case the court said:

> "The suppression of nuisances injurious to public health or morality is among the most important duties of government. Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple."

The manufacture and sale of intoxicating liquors can be lawfully prohibited by the states because of the inherent nature of intoxicating liquor, its effects upon those using it to excess, and the attendant effects upon the public at large.

Mugler v. Kansas, 123 U. S. 623, 662.

Crowley v. Christensen, 137 U. S. 86, 90.

In the latter case the court said:

> "There is in this position an assumption of a fact which does not exist, that when liquors are taken in excess the injuries are confined to the party offending: The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But, as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him. By the

general concurrence of opinion of every civilized and Christian community, there are few sources of crime and misery to society equal to the dram shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying. The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons, than to any other source. The sale of such liquors in this way has therefore been at all times, by the courts of every state, considered as the proper subject of legislative regulation. Not only may licenses be exacted from the keeper of a saloon before a glass of his liquors can be disposed of, but restrictions may be imposed as to the class to whom they may be sold, and the hours of the day, and the days of the week, on which they may be sold. Their sale in that form may be absolutely prohibited. It is a question of public expediency and public morality and not of federal law. The police power of the state is fully competent to regulate the business—to mitigate its evils or to suppress it entirely. There is no *inherent* right in a citizen to thus sell intoxicating liquors by retail; it is not a privilege of a citizen of a state or a citizen of the United States. As it is a *business* attended with danger to the community it may, as already said, be entirely prohibited, or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulations rests in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on, and to issue licenses for that purpose. It is a matter

> of legislative will only. As in many other cases, the officers may not always exercise the power conferred upon them with wisdom or justice to the parties affected. But that is a matter which does not effect the authority of the state, or one which can be brought under the cognizance of the courts of the United States."

Cigarettes may be prohibited, not only as to manufacture, but as to use, by the state because of their inherent effect upon the users.

In the case of *Austin v. Tennessee,* 179 U. S. 343, 361, the court said:

> "There is doubtless fair ground for dispute as to whether the use of cigarettes is not hurtful to the community, and therefore it would be competent for a state, with reference to its own people, to declare, under penalties, that a cigarette should not be manufactured within its limits. No one could say that such legislation trenched upon the liberty of the citizen by preventing him from pursuing a lawful business."

The Act of Congress prohibiting the transportation of lottery tickets in interstate commerce was upheld by this court for the same reason, in the case of *Champion vs. Ames,* 188 U. S. 321, 355, where the court said:

> "In determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the

nature of the interstate traffiic which it was sought by the act of May 2, 1895, to suppress cannot be overlooked. When enacting that statute Congress no doubt shared the views upon the subject of lotteries heretofore expressed by this court. In *Phelan v. Virginia,* 8 How. 163, 168, 12 L. Ed. 1030, after observing that the suppression of nuisances injurious to public health or morality is among the most important duties of government, this court said: 'Experience has shown that the common forms of gambling are comparatively innocuous when placed in contact with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earning of the poor; it plunders the ignorant and simple' * * *

"If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that *inhere* in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several states, provide that such commerce shall not be polluted by the carrying of lottery tickets from one state to another? * * * We have said that the liberty proctected by the Constitution embraces the right to be free in the enjoyment of one's faculties; 'to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper,' *Allegeyer v. Louisiana,* 165 U. S. 578, 589, 41 L. Ed. 832, 835, 17 Sup. Ct. Rep. 426, 531,. But surely it will not be

> said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the states an *element* that will be confessedly injurious to the public morals."

It must be remembered that the power of Congress over interstate commerce is nothing more or less than a grant of police power by the states to Congress over that particular subject, and that the power to regulate, manifests itself in precisely the same ways as does the police power when exercised by the states, that is, in the matter of prohibition of certain things and regulation of others.

The purchase and sale of commodities on margins can be constitutionally prohibited by the legislature because of the tendency to gambling, even though the act is broad enough to prohibit all such transactions, including those in which there is no element of gambling whatever.

Otis & Gassman v. Parker, 187 U. S. 606.

In that case the court said:

> "We cannot say that there might not be conditions of public delirium in which at least a temporary prohibtion of sales on margin would be a salutary thing. Still less can we say that there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagreed with the opinion. *Of*

> *course, if a man can buy on margin he can launch into a much more extended venture than where he must pay the whole price at once.* If he pays the whole price he gets the purchased article, whatever its worth may turn out to be. *But if he buys stocks on margin he may put all his property into the venture, and being unable to keep his margins good if the stock market goes down, a slight fall leaves him penniless, with nothing to represent his outlay except that he has had the chances of a bet.* There is no doubt that purchases on margin may be and frequently are used as a means of gambling for a great gain or a loss of all one has. It is said that in California, when the constitution was adopted the whole people were buying mining stocks in this way, with the result of *infinite* disaster."

The direct statement by this court is found in the case of *Murphy v. California*, 225 U. S. 623, where the court said:

> "The Fourteenth Amendment protects the citizen in his right to engage in any lawful business but it does not prevent legislation intended to regulate useful occupations which, because of their nature or location, may prove injurious or offensive to the public. Neither does it prevent a municipality from prohibiting any business which is *inherently* vicious and harmful."

The manufacture of oleomargarine may be constitutionally prohibited by the state because of the tendency of oleomargarine to deceive the public.

McCray v. United States, 195 U. S. 27, 63.

In that case this court said:

> "As we have said, it has been conclusively settled by this court that the tendency of that *article* to deceive the public into buying it for butter is such that the states may, in the exertion of their police powers, without violating the due process clause of the Fourteenth Amendment, absolutely *prohibit* the manufacture of the article."

The use of trading stamps can be prohibited for the same reason.

Rast v. Van Deman, 240 U. S. 342, 364.

In that case this Court said:

> "But there may be partial or total dispute of the propositions. *And it can be urged that the reasoning upon which they are based regards the mere mechanism of the schemes alone, and does not give enough force to their influence upon conduct and habit, not enough to their insidious potentialities.* As to all of which not courts, but legislatures, may be the best judges, and, it may be, the conclusive judges." * * *
>
> "The *schemes* of complaints have no such directness and effect. They rely upon something else than the article sold. They attempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an *appeal* to cupidity lure to improvidence. This may not be called in an exact sense a 'lottery,' may not be called gambling; it may, however, be considered as having the seduction

> and evil of such, and whether it has may be a matter of inquiry—a matter of inquiry and of judgment that it is finally within the power of the legislature to make."

The above rule was reiterated by this Court in the case of *Tanner v. Little,* 240 U. S. 368, 384, where the court said:

> "However, a decisive answer to the question need not be given, for we have said, in *Rast v. Van Deman & L. Co.,* that the 'premium system' is not one of advertising merely. It has other, and, it may be, deleterious, consequences. It does not terminate with the bringing together of seller and buyer, the profit of one and the desire of the other satisfied, the article bought and its price being equivalents. It is not so limited in its purpose or *effect.*"

The principle was stated a great deal more explicitly by this Court in the case of *Clark Distilling Co. v. Western Maryland R. Co.,* 242 U. S. 311, 322, where it is said:

> "Before concluding, we come to consider what we deem to be arguments of inconvenience which are relied upon; that is, the dread expressed that the power by regulation to allow state prohibitions to attach to the movement of intoxicants lays the basis for subjecting interstate commerce in all articles to state control, therefore destroys the constitution. *The want of force in the suggested inconvenience becomes patent by considering the principle*

which, after all, dominates and controls the the question here presented; that is, the subject regulated and the extreme power to which that subject may be subjected. The fact that regulations of liquor have been upheld in numberless instances which would have been repugnant to the great guaranties of the constitution but for the *enlarged right* possessed by government to regulate liquor has never, that we are aware of, been taken as affording the basis for the thought that government might exert an enlarged power as to subjects to which under the constitutional guaranties, such enlarged power could not be applied. In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the constitution, embrace."

Again, in the case of *Wilson v. New*, 243 U. S. 332, 346, it is said:

"It is equally certain that where a particular subject is within such authority, the *extent* of regulation depends on the nature and *character* of the *subject* and what is appropriate to its regulation. The powers possessed by government to deal with a subject are neither inordinately enlarged or greatly dwarfed because the power to regulate interstate commerce applies. This is illustrated by the difference between the much greater power of regulation which may be exerted as to *liquor* and that which may be exercised as to *flour, dry goods* and *other commodities.* It is shown by the

> settled doctrine sustaining the right by regulation absolutely to prohibit *lottery tickets*, and by the obvious consideration that such right to prohibit could not be applied to *pig iron, steel rails* or *most of the vast body of commodities.*"

Again, in *Adams v. Tanner,* 245 U. S. 590 this Court, in holding that the employment agency business could not be prohibited, said:

> "But we think it plain that there is nothing *inherently* immoral or dangerous to the public welfare in acting as paid representative of another to find a position in which he can earn an honest living."

Some ministers of the gospel have violated not only the moral but the statutory law as well and are serving terms in prison; some grocers have put sand in the sugar, and sold as pure, adulterated articles, and have sold short weight; some dairymen have put water in milk and sold it as milk; some tradesmen have sold articles under misrepresentation as to quality; some employment agents have been thoroughly dishonest and criminal in their business; some bankers have stolen depositors' funds; and in every walk of life, in every business, in every occupation, can be found engaged dishonest and unscrupulous men; but no one has yet successfully contended that lawful occupations can be damned to every honest man by reason of the dishonesty of

a few. The same argument is made to sustain this ordinance as was made to sustain *Initiative No.* 8, of this state, which prohibited any employment agent from charging a fee, reward or compensation for securing employment for anyone or for furnishing information leading thereto, and the state-court listened with approval to the argument.

Huntworth v. Tanner, 87 Wash. 670.

State v. Rossman, 93 Wash. 530.

But those decisions were contrary to the constitution of the United States.

Adams v. Tanner, 244 U. S. 590.

In that case this Court, in holding that the employment agency business could not be prohibited to all men by reason of the dishonesty and abuses which sometimes occurred in it, said:

> "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practice: and as to every one of them, no doubt, some can be found ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about ap-

> parent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

That there may be no mistake as to the extent to which arguments similar to that made by the defendants in error was made in favor of Initiative No. 8, we invite this Court's attention to the vigorous dissenting opinion of Mr. Justice Brandeis, in the case last cited.

There must, of course, be a limit to the power of legislative prohibition. Necessarily that limit must be fixed. If the test be not found in the inherent characteristics or nature of the act in question, then there is no test, but the limit of legislative action is dependent, in the final analysis, upon the personnel of this Court, and conceivably what would be an inherent right, beyond legislative prohibition at one time, might, by reason of nothing more than a change in the membership of this Court become a privilege merely, and subject to legislative prohibition. It seems impossible to believe that what we have been wont to regard as constitutional rights are not fixed and are not beyond the changing views of men, and that what is a constitutional right

today conceivably may not be such tomorrow, although the constitution may not have been amended.

It is, therefore, confidently submitted that the right to prohibit must be found in the inherent nature or characteristic of the business at which the legislative act is directed.

THE BUSINESS OF PAWNBROKER IS LAWFUL AND THE LEGISLATURE CANNOT PROHIBIT ANY HONEST MAN FROM ENGAGING THEREIN.

The business of pawnbroker, both as defined in Section 3 of the ordinance and as it is commonly understood, is merely the loaning money on pledged personal property, the physical custody of which is actually delivered to and held by the pledgee until payment. The loaning of money has become so general that if it were suddenly stopped the business of the world would immediately cease with it, in which event the large financial centers of the United States would be in absolute panic. There is nothing inherently wrong in the borrowing of money or in the loaning of it. No one even so contends. One of the most common practices is the giving of security for the loan, and indeed the amount of money borrowed without security is comparatively small. The very large part of money borrowed is on pledge of

collateral. As a matter of fact, and law, it is immaterial whether the collateral is a bond or physical personal property. In either event the pledged property stands as a guarantee of payment and the borrower has secured the sum he desires to borrow and the lender has loaned the amount he desires to lend. Of course, it cannot be seriously asserted that the pledge of collateral security to a bank or a money loaning institution is lawful and legitimate, and has no evil tendencies, inherent in the transaction, but that a loan from a pawn broker and the pledging of physical personal property with him as security for the payment is not legitimate and is not lawful and does have in it inherently tendencies to evil. The one is just as lawful and just as legitimate as the other and equally free from any inherent evil or tendency to evil, and no amount of argument can change this self evident fact. It is said that thieves sometimes resort to dishonest pawnbrokers for the purpose of disposing of stolen property. What of it? Does one dishonest pawnbroker have it in his power to damn the business to all honest men? Is it not a question of the personality of the pawnbroker in the final analysis, and does anything but the personality of the pawnbroker have anything whatever to do with the question whether the business is carried on honestly or dishonestly?

Nor can it justly be said that the business is such that it cannot be carried on honestly, nor, in the great majority of cases, that it is not carried on honestly. Of course, there are dishonest men in that business as well as in every other known business, but that is no reason for prohibiting the business to all honest men. The assumption, or the fact if it be fact, that the business offers temptation to an honest man to practice dishonesty does not justify legislative prohibition of the business. The temptations surrounding an employment agent are forcibly stated in the dissenting opinion of Mr. Justice Brandies in the case of *Adams vs. Tanner*, 244 U. S. 500, but they are not grounds for prohibiting the business.

Nor can it be said that the pawnbroker does not furnish needed service. It is so unnecessary to go into detail as to the service that he does furnish, and the needy people to whom that service is furnished, that we shall not burden the court with a detailed statement of it. The fact is entirely obvious. Suffice it to say that but for the service he furnishes, many needy people would be without the necessaries of life, on those occasions when misfortune or adversity overtakes them.

The action of the city itself forecloses it from contending that the business of a pawnbroker is not a lawful business. Subdivision 33 of Section 8966 of Remington's Compiled Statutes is as follows:

> "Any such city shall have power—
>
> "33. To grant licenses for any lawful purpose, and to fix by ordinance the amount to be paid therefor, and to provide for revoking the same: Provided, that no license shall be granted to continue for longer than one year from the date thereof."

If the business is not lawful the City cannot license it. The City, however, is asserting the power to license the business, and it thereby is foreclosed from contending that the business itself is not lawful. Furthermore, the business is recognized as lawful by the statutes of the state. Remington's Compiled Statutes, Sections 2481-2488.

Judge Mackintosh, speaking for the court, said:

> "In certain of its aspects, pawnbroking may be harmless, but, on the other hand, it is common knowledge that both on account of the nature of the business itself and somewhat on account of the character of those who engage in it, it offers a ready shelter for thievery, and to that extent, encourages criminality."

If dishonest men have engaged in the business of pawnbroking, the function of government is to see

that those men do not secure the necessary license to engage in the business, and not by one act to attempt to abolish the business. We find ourselves utterly unable to agree with the learned court that "the nature of the business itself" offers a ready shelter for thievery and that it encourages criminality, and we do not believe that any fact can be put forward in justification of that statement. There is no justification for blaming a business or a calling for the dishonesty of a few men who engage in it, to the detriment and absolute loss of many honest men who have invested their money in the same kind of business. The power of government extends to prohibiting dishonest men from engaging in business, and not prohibiting business to all honest men. The argument which is made to sustain this ordinance incontrovertably leads to the conclusion that if any dishonesty occurred in any business thereby is furnished justification for the legislature to abolish the business. Not all courts are in accord with the Supreme Court of Washington. In the case of *Louisiana vs. Ipzzovitch*, 49 La. 366, the court, in speaking of the business of pawnbroker, said:

> "The occupations attempted to be regulated are legitimate occupations, licensed by the

> state, and the city can impose no burden upon the carrying on of these occupations not authorized by the legislature."

In the case of *Butte vs. Paltrovich,* 39 Mont. 18, the court, speaking of the same business, said:

> "The mere fact that appellant's business is legitimate and specially recognized as such by legislative enactment, does not render ineffectual the power conferred by Subdivision 16 above."

Section 16 of the statute authorized the town council to license, among other occupations, pawnbrokers. In the case of *Grand Rapids vs. Braudy,* 105 Mich. 670, the question before the court was whether the legislative authority had power to require a license as a condition precedent to engaging in business as a pawnbroker. It makes no difference what the business in question is, the legislature has the power to require anyone desiring to engage therein to take out a license so to do.

In *St. Joseph vs. Levin,* 128 Mo., 588, the question before the court was whether a city could compel pawnbrokers to keep a book and enter therein a list of pledges and descriptions thereof. It is so fundamental that such a record can be required under the police power that the question whether the business was a priviledge or a right could not possibly have been involved in the case.

In the case of *Elsner Bros. vs. Hopkins,* 113 Va. 47, the question was as to the validity of an ordinance making it unlawful for pawnbrokers to sell fire arms. The right to limit the sale of fire arms by anyone, whether a pawnbroker or not, is recognized everywhere.

In *Grossman vs. Indianapolis,* 173 Ind., 157, the question was whether an ordinance requiring junk dealers to take out licenses was valid and the same question was before the court in *St. Louis vs. Baskowitz,* 201 S. W. 870. The right under police power to require anyone in whatever occupation to take out a license is fundamental.

In *Levinson vs. Boas,* 150 Cal. 185, the question before the court was whether one who borrowed money from a man who was in fact a pawnbroker but who had failed to take out a license, could be compelled to repay the money, or whether the failure to take out a license as a pawnbroker made the contract void.

In the case of *Wood vs. Krepps,* 168 Cal., 382, the court, speaking of the business of pawnbroker, said:

> "There is no law in the state making the business of loaning money on personal property

illegal. It is a legitimate branch of commercial business which the state has only regulated to the extent of fixing the maximum rate of interest. The business itself, however, is not affected. It is neither *malum in se* nor *malum prohibitum* * * *. There is nothing on our statute which says that it is unlawful to follow the business of loaning money at interest. Such business is not *malum in se* nor is it *malum prohibitum.*"

It is believed that the business of a pawnbroker is not, in effect, different from that of buying and selling second hand goods or second hand personal property. We cannot believe that the legislature could prohibit all persons from engaging in the business of buying and selling second hand personal property, merely because of the fact, if it be a fact, that there are men engaged in the business who carry it on by dishonest means, and who connive with thieves for the purpose of aiding them in disposing of stolen property. It would be a strange doctrine if, under the Fourteenth Amendment, an honest man could not engage in a business free from inherent tendencies to evil, because of the fact that such character of business had been used by dishonest men for the accomplishment of criminal ends.

No dishonest man has any constitutional right to engage in any business or occupation in which the

public is exploited by means of his dishonesty. Nor would anyone seriously question the right of the legislature to adopt such reasonable measures as would make it impossible for dishonest men to engage in any business which might be used for the purpose of cheating or defrauding the public, or for the purpose of accomplishing dishonest transactions. In fact, the legislature at all times possesses the right, if it deems it necessary, to require everyone to secure a license to engage in any kind of business in which dishonest practices may be indulged, and by means of a licensing system, make it impossible for dishonest men to engage in such businesses or callings as afford them means to practice dishonesty.

In the case of *State vs. Bowen & Co.,* 86 Wash. 23, 28, the Supreme Court of the State of Washington, holding an act requiring commission men, that is men engaged in the business of receiving and selling farm and garden produce on commission, to take out a license as a condition precedent so to do, said:

> "The particular business here sought to be regulated is, of course, a legitimate and, in many respects, a necessary and important business. The business of producing farm, garden, orchard, and dairy products is one of the most important industries of the state. The producer

> cannot ordinarily be both producer and marketer. The legislature seems to have found that there exists a class of factors or merchants whose principal business is that of selling such produce on commission, and that certain abuses have grown up in that business; so, to provide regulation and prevent such abuses, the act in question was passed."

Of course, no one would seriously contend that representing another, in the receipt and sale of garden and farm produce, as his agent, honestly, is not a constitutional right. Yet this court held that a license might be required so to do, even in that class of business.

Payne vs. Kansas, 248 U. S. 112.

The same may be said of the business of an employment agent.

Spokane vs. Macho, 51 Wash. 322.

Brazee vs. Michigan, 241 U. S. 340.

Adams vs. Tanner, 244 U. S. 590.

In neither case can the legislature prohibit the business, but in either case it may enact a licensing system by means of which dishonest men can be kept out of the business and dishonest practices prevented. Hence, we submit, that the power of the legislature, with respect to the business of a pawnbroker, extends no further than to require a license,

for the purpose of keeping dishonest men out of the business, and preventing dishonest practices therein, and that in no event can the legislature prohibit the business to honest men.

THE CITY CANNOT DECLINE TO GRANT A LICENSE TO THE PLAINTIFF IN ERROR MERELY BECAUSE HE IS A SUBJECT OF THE EMPEROR OF JAPAN.

Excepting (1) the right of the state to prohibit the ownership of lands within its border, there being no treaty to the contrary, (*Chirac vs. Chirac,* 2 Wheat, 259, 272; *Hauenstein vs. Lyman,* ~~199~~ 100 U. S. 483, 484; *DeVaughn vs. Hutchinson,* 165 U. S. 565; *Clarke vs. Clarke,* 178 U. S. 186; *Blythe vs. Blythe,* 180 U. S. 333; *Terrace vs. Thompson,* decided Nov. 12, 1923); (2) the right of the state to limit the right to take the common property of the state, such as game and fish, to citizens of the state, (*McCready vs. Virginia,* 94 U. S. 391; *Patsone vs. Pennsylvania,* 232 U. S. 138); (3) the right of the state, and (there being no statute to the contrary) of any municipality therein to employ none but citizens on public work, (*Atkin vs. Kansas,* 191 U. S. 207; *Heim vs. McCall,* 239 U. S. 173); and, (4) the power to limit the right of the franchise to citizens of the state, (*Yick Wo vs. Hopkins,* 118 U.

S. 336, 370); aliens are within the equal protection clause as fully as citizens.

Ex parte Virginia, 100 U. S. 339, 345.

Yick Wo vs. Hopkins, 118 U. S. 356, 359.

Fong Yue King vs. United States, 149 U. S. 698, 724.

Wong Wing vs. United States, 163 U. S. 228, 242.

United States vs. Wong Kim Ark, 169 U. S. 649, 694.

American Sugar Refining Co. vs. Louisiana, 179 U. S. 694.

Truax vs. Raich, 239 U. S. 33.

Buchanan vs. Warley, 245 U. S. 60, 76.

Re Tiburcio Parrott, 1 Fed. 481.

Ah Kow vs. Nunan, 5 Sawy. 552.

Re Ah Fong, 3 Sawy. 144.

State vs. Montgomery, 94 Me. 192.

Templar vs. Board, 131 Mich. 254.

Re Opinion of Justices, 207 Mass. 601.

Commonwealth vs. Titcomb, 229 Mass. 14.

McKnight vs. Hodge, 55 Wash. 289, 292.

In the case of *Yick Wo vs. Hopkins,* 118 U. S. 356, 359, this Court said:

> "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any person of life, liberty, or property